

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VENICE PI, LLC,

Plaintiff,

v.

SEAN O'LEARY JR., et al.

Defendants.

Civil Action No. 17-cv-988TSZ

VENICE PI, LLC,

Plaintiff,

v.

JONATHAN DUTCZAK, et al.

Defendants.

Civil Action No. 17-cv-990TSZ

VENICE PI, LLC,

Plaintiff,

v.

MARTIN RAWLS, et al.

Defendants.

Civil Action No. 17-cv-991TSZ

VENICE PI, LLC,

Plaintiff,

v.

INA SICOTORSCHI, et al.

Defendants.

Civil Action No. 17-cv-1074TSZ

VENICE PI, LLC,
Plaintiff,
v.
GREGORY SCOTT, et al.
Defendants.

Civil Action No. 17-cv-1075TSZ

VENICE PI, LLC,
Plaintiff,
v.
YELENA TKACHENKO, et al.
Defendants.

Civil Action No. 17-cv-1076TSZ

VENICE PI, LLC,
Plaintiff,
v.
CELINA POTTER, et al.
Defendants.

Civil Action No. 17-cv-1160TSZ

VENICE PI, LLC,
Plaintiff,
v.
TONJA LAIBLE, et al.
Defendants.

Civil Action No. 17-cv-1163TSZ

VENICE PI, LLC,
Plaintiff,
v.
VICTOR TADURAN, et al.
Defendants.

Civil Action No. 17-cv-1164TSZ

VENICE PI, LLC,

Plaintiff,

v.

JESSE COOPER, et al.

Defendants.

Civil Action No. 17-cv-1211TSZ

VENICE PI, LLC,

Plaintiff,

v.

JASMINE PATTERSON, et al.

Defendants.

Civil Action No. 17-cv-1219TSZ

VENICE PI, LLC,

Plaintiff,

v.

DAVID MEINERT, et al.

Defendants.

Civil Action No. 17-cv-1403TSZ

Plaintiff respectfully submits this response to the Court's Minute Order of January 8, 2018 (Dkt. 32).

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1 This is the second order issued by the Court requesting an offer of proof from Plaintiff in these
 2 cases. Plaintiff and its undersigned counsel take the Court's concerns seriously and wish to address each
 3 area of concern to the best of their ability. As a preliminary matter, Plaintiff appreciates that the source
 4 of concern for these cases generally may originate from plaintiffs or law firms who have broken ethical
 5 or procedural rules in the enforcement of copyright interests in previous cases of this general nature, and
 6 that there are defense-group websites advancing an array of assertions about various aspects of such
 7 enforcement generally. To that end, Plaintiff and its counsel welcome the opportunity to demonstrate that
 8 their practices comply with all applicable laws, the Civil Rules, and the Rules of Professional Conduct.
 9 Plaintiff respectfully submits that all assertions to the contrary find no support in the evidence or law.
 10 They are, at best, mistaken, and at worst are false and motivated by a fundamental disagreement over
 11 whether copyright law should continue to prohibit and punish infringers such as those identified in this
 12 case. Plaintiff invested considerable time and provided extensive testimony and evidence in response to
 13 the Court's earlier November 3, 2017 Minute Order (Dkt. #27) in its December 1, 2017 response.
 14 (Dkt. 28) In response to the Court's specific questions, Plaintiff submitted reports from three separate
 15 experts demonstrating that (1) the IP addresses cannot be spoofed or faked; (2) the content in question is
 16 enough to constitute copyright infringement and is playable; and (3) each Defendant is identified in a
 17 manner consistent with the controlling authority and Federal Rules of Civil Procedure, such that the
 18 complaint not only states a claim that is plausible, but rather one that is highly probable. (Id. & Dkt. 29,
 19 29-1) Plaintiff also submitted a declaration of Michael Wickstrom, a Senior Vice President personally
 20 responsible for the copyright enforcement efforts of Plaintiff and its related companies, documenting the
 21 ongoing and substantial hardship being caused to the industry by the rampant infringement occurring in
 22 this and other districts. (Dkt. 30) In this submission, Plaintiff will address the additional concerns raised
 23 by the Court.

24 **A. INFRINGEMENT IS PURSUED PROFESSIONALLY, WITHOUT ABUSE**

25 The Court has expressed concern for the potential for abuse in cyber-piracy enforcement
 26 efforts. (See, e.g., Dkt. #27 ¶¶ 2 n.1 and 3 and *Cobbler Nevada, LLC v. Kevin James*, Case

No. C15-1430TSZ, Dkt. #78) Plaintiff respectfully submits that there is no abuse here, and that its pursuit of infringers has been diligent, respectful, and in accordance with applicable laws and rules.

1. Plaintiff's enforcement cannot be equated with prior bad actors

The current enforcement efforts in this jurisdiction are distinct from prior BitTorrent efforts in this and other jurisdictions. Many prior BitTorrent cases were brought by small media companies in the adult film industry, such as by the Prenda Law firm or Malibu Media. Prenda is now a defunct firm whose principals were placed under federal indictment in December 2016 for “an elaborate scheme to fraudulently obtain millions of dollars in copyright lawsuit settlements by deceiving state and federal courts throughout the country.” *Indictment, United States v. Hansmeier*, No. 0:16-cr-00334 (D. Minn. Dec 14, 2016) Prenda was found to have lied to the court, forged documents, practiced identity theft and to have even “seeded” their clients’ movies on BitTorrent Networks, which made them available for download in the first place. *See id.*; *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *2-3, *5 (C.D. Cal. May 6, 2013). Plaintiff shares any concern the Court may have with this sort of enforcement; however, it would be unfair and inaccurate to assume that all BitTorrent-based copyright enforcement is conducted in such an unfair or unethical manner.

Malibu Media apparently uses similar forensic technology to identify BitTorrent infringers, albeit obtained from different data providers and licensees than Plaintiff uses in these cases. The focus of Malibu Media is on adult titles. Some courts have expressed concern that the adult subject matter in such cases may lead to coercion of defendants—that is, “there is a fear that regardless of a defendant’s actual culpability, he may feel compelled to settle the lawsuit confidentially in order to avoid the embarrassment of being named as a defendant in a case” *Malibu Media, LLC v. Doe*, 285 F.R.D. 273, 278 (S.D.N.Y. 2012) (dealing with pornographic content). However, this concern is more prevalent in cases involving allegations of infringement on pornographic content. Such concerns are not as prevalent where, as in these cases, Plaintiff is associated with a major movie studio—in this case Voltage Pictures—whose titles are mainstream films featuring

1 well-known actors and director, such as *Once Upon a Time in Venice*, *A Family Man*, *The Cobbler*
 2 and *Dallas Buyers Club*. That said, Plaintiff's practice in these and other similar cases is to avoid
 3 behaviors that seek to threaten, embarrass, or otherwise coerce defendants into settling. In this
 4 sense, the association of defendants with the activity complained of here is no different than in a
 5 typical case for infringement of a copyright, such as, for example, the many thousands of cases
 6 brought by the recording industry's anti-piracy cases seeking enforcement of music copyrights or
 7 the computer-software industry's anti-piracy cases seeking enforcement of copyrights in computer
 8 software. *See cases infra*.

9 Contrary to the enforcement efforts identified above, for example in the pornographic film area,
 10 BitTorrent enforcement efforts in this jurisdiction have, since initiated by Plaintiff's counsel's firm in
 11 July 2014, been undertaken with good faith diligence, transparency and every effort at strict adherence
 12 with the law and applicable court rules. Indeed, as explained by motion picture executives such as Mr.
 13 Wickstrom, (Dkt. 30), the motivation of such enforcement efforts is to educate, deter future wrongdoing,
 14 and seek compensation from responsible parties. In other words, such enforcement efforts are designed
 15 to right a private wrong by obtaining compensation for the devaluation of copyrighted works wrought
 16 by piracy and perform a public good by upholding and enforcing the copyright law as it currently exists—
 17 which is precisely the purpose of the legal system.

18 The legal fight against BitTorrent piracy is not being waged by the movie industry alone, or
 19 solely by the present Plaintiff. Likewise, the naming of John Doe defendants together with requests for
 20 discovery to determine actual identities is a long-established procedure that is approved by the courts and
 21 used by many other companies and entities such as Microsoft with respect to software (e.g., *Microsoft*
 22 *Corp. v. Doe*, No. C17-1587RSM, 2017 U.S. Dist. LEXIS 181205 (W.D. Wash. Nov. 1, 2017)),
 23 Yahoo! regarding trademark and false advertising (*Yahoo!, Inc. v. Doe*, No. 16-cv-02879-LHK
 24 (HRL), 2016 U.S. Dist. LEXIS 78143 (N.D. Cal. June 15, 2016)), John Wiley & Sons with respect
 25 to books (*John Wiley & Sons, Inc. v. Doe*, 284 F.R.D. 185 (S.D.N.Y. 2012)), and Arista Records with
 26 respect to music (*Arista Records Ltd. Liab. Co. v. Doe*, 604 F.3d 110 (2d Cir. 2010)). In the foregoing

1 cases, as with these, the initial inquiry leads to IP addresses that were used to misappropriate copyrighted
 2 content. Initial discovery then identifies an account holder for the IP address, and subsequent discovery
 3 confirms the account holder is the infringer or (on rare occasions) leads to an additional or different
 4 defendant who may be named.

5 Plaintiff here does not merely follow the procedural path used by the exemplary parties identified
 6 above in the software, music and book publishing industries. Plaintiff also rigorously verifies the fact that
 7 piracy has occurred, seeks confirmation that it is associated with a particular defendant, and directs its
 8 enforcement against the worst offenders—typically those who have pirated numerous titles over a period
 9 of time. Only after a thorough investigation to address the same issues raised in the Court’s Minute Order
 10 does Plaintiff proceed with the filing of a complaint.

11 **2. *Plaintiff has Strictly Adhered to the Court’s Ordered Procedure on Discovery,***
 12 ***but Needs Early Discovery to Name Defendants with Specificity***

13 The most difficult issue in cases such as these is the specific naming of the party Defendant.
 14 Defendants use BitTorrent technology as part of an intentional effort to steal movies anonymously, hiding
 15 behind their computer interfaces. Plaintiff cannot name defendants specifically at the time of filing the
 16 complaint, and has always sought to do so only after discovery or other investigation would allow it to
 17 name the correct party, and always in accordance with the law and applicable rules. In earlier similarly
 18 situated cases, plaintiffs sought leave to conduct early depositions or other discovery calculated to
 19 enable defendants to be named with even greater certainty. The Court, however, denied leave for
 20 such discovery while allowing the possibility of amending the pleadings to name different
 21 defendants if appropriate. For example, by Order dated January 26, 2016, the Court denied the
 22 Rule 45 leave motion and instructed the plaintiff as follows:

23 Plaintiff has the names of the holders of each IP address that allegedly infringed its
 24 film, and can proceed by naming those parties as defendants and conducting
 25 discovery in the normal course prescribed by the Federal Rules. *See, e.g., Hard*
 26 *Drive Prods., Inc. v. Doe*, 2012 WL 90412, *2-3 (E.D. Cal. Jan. 11, 2012) (denying
 request to depose identified IP address holders). To the extent subsequent case

1 developments show that the IP holders are not the infringing parties, plaintiff may
2 seek to amend the Complaint as necessary.

3 *Cobbler v. James*, Case No. 15-cv-1430TSZ (Dkt. 16); *see also Dallas Buyers Club v. Does*, Case
4 No. 15-cv-134RAJ (and others) (Dkt. 48). Accordingly, Plaintiff has proceeded in accordance with
5 such orders, and respectfully submits that proceeding in this fashion is proper and in accordance
6 with the applicable laws and Civil Rules. Indeed, Plaintiff wants nothing more than to name and
7 pursue the actual infringer, and to follow the Civil Rules and guidance of the Court in doing so.

8 As stated in Plaintiff's prior response, (see Dkt. 28, p. 10), when allowed to proceed with
9 formal discovery after naming, such as in *Cobbler v. James*, Case No. 15-cv-1430TSZ, plaintiffs seek
10 reasonable discovery to confirm infringement. This sort of additional discovery, when permitted, could
11 further confirm the identity of the proper defendant and is no different than in any other case in which
12 the Plaintiff is in possession of more than enough facts to make a claim plausible, but needs some
13 discovery to fully prove its case.

14 In summary, Plaintiff submits that its actions (and those of undersigned counsel) in pursuit of
15 rampant copyright infringement have been appropriate at all times.

16 **3. The Court's Order Forbidding Any Communication with Defendants Should be 17 Rescinded**

18 The Court's November 3, 2017 Minute Order forbade Plaintiff's counsel from "[any]
19 communica[tions] with any unrepresented defendant in any manner for any purpose." (Dkt. 27 p. 4) The
20 undersigned counsel has not engaged in any discovery in advance of a Rule 26(f) conference, and has
21 complied with the Federal Rules of Civil Procedure. Although (prior to the above order) counsel has
22 communicated with defendants informally, and has sought information through such communications,
23 correspondence of this sort occurs in every civil action and is not precluded by the proscription of
24 Rule 26(d). As the Central District of California recently explained, informal investigations do not fall
25 within the scope of formal discovery regulated by Rule 26. *In re Boff Holding, Inc. Sec. Litig.*, 318 F.R.D.
26 129 (S.D. Cal. 2016). Indeed, in the Advisory Committee Note to Rule 26(d), the Committee expressly
stated that "[t]his subdivision is revised to provide that formal discovery—as distinguished from

interviews of potential witnesses and other informal discovery—not commence until the parties have met and conferred as required by subdivision (f).” For this reason, the *In re BofI Holding* court stated that it was aware of “no authority indicating that the Court has the power to issue protective orders prohibiting informal investigations conducted before discovery has commenced.” *In re BofI Holding*, 318 F.R.D. at 133. Plaintiff submits that the notice letters of the sort cited above (or subsequent emails or phone conversations, which are typically initiated by the defendants in response to such letters) do not constitute discovery under Rule 26. Moreover, the letters sent by Plaintiff or its counsel here are respectful, professional, and courteous. Many defendants also respond to the fact of being named and served with a complaint by reaching out to Plaintiff’s counsel in an effort to resolve the dispute or to discuss it, and presently (in accordance with the above order) counsel must refuse to take any phone calls, and cannot return any calls or emails. Plaintiff contends that it should be allowed to communicate with Defendants.

4. *Settlement Discussions are Appropriate, and the Settlements are Fair*

Likewise, settlement discussions are permissible and appropriate. Parties routinely engage in discussions about the merits of cases and possibilities of settlement before the filing of the action and before a Rule 26(f) conference. Such discussions allow both sides to better understand the merits of the positions and often lead to settlement. As the Central District of Illinois stated:

One person’s cottage industry in harassing lawsuits is another person’s vigilant defense of property rights. ... The proliferation of these types of lawsuits would be expected given the alleged infringement by thousands of people. The volume of lawsuits alone does not indicate any impropriety. The fact that [Plaintiff], and others, may settle these suits quickly also does not indicate any wrongdoing. **Settlement of civil disputes is generally a positive outcome, not a negative one.**

Patrick Collins, Inc. v. John Does 1-9, 2012 WL 4321718 at *5 (C.D. Ill. Sept. 18, 2012) (emphasis added). It is also well established that private parties may settle their controversies at any time. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 309 (1897), cited with approval in *Dallas Buyers Club v. Does*, Case Nos. 15-cv-134RAJ (and others) (Dkt. 48, p. 4). If there can be

1 no settlement discussions, then the parties and the Court will expend far more time and resources
2 in the effort to resolve these actions.

3 Although communications, informal discovery, and settlement efforts should all be
4 permissible, Plaintiff submits that it has complied with the *Venice* order cited above not to
5 communicate with any unrepresented individual. At the same time, Plaintiff respectfully submits
6 that the order is not founded in the Federal Rules and is contrary to the objectives of a speedy and
7 efficient resolution of disputes. As such, Plaintiff has requested that the order be revised and that
8 the prohibition be removed. (See, e.g., Dkt. 27 p. 4)

9 In addition, Plaintiff has settled its disputes with the defendants in these enforcement
10 actions in a manner that is fair and cannot be considered coercive, extortionist, or otherwise beyond
11 the law. On this issue, Plaintiff submits three main points. First, in the course of settling disputes,
12 and as a condition of such settlement, Defendants acknowledge and take responsibility for the
13 accused piracy. Plaintiff is not aware of any instance in which any settlement was entered into in
14 which the copyright infringement did not actually occur, and would never knowingly do so.
15 Second, the settlements are fair as to the amount. On average, the settlements are on par with the
16 amount granted by the Court when entering default judgments. There are no improprieties and at
17 all times the practices are intended to be fair and equitable under the circumstances while enforcing
18 Plaintiff's rights under the law. Third, as confirmed by Plaintiff's representative in the motion
19 picture industry, these anti-piracy efforts are absolutely not a revenue model. To the contrary, as
20 explained by Mr. Wickstrom, they are part of a critical effort necessary to meet distributor
21 obligations and ensure the continued viability of the industry:

22 Often a title is provided to a distributor with minimum guarantees. But when the
23 title is pirated, many distributors respond with a demand for reduction in the
24 minimum guarantee, or some other assurance that Venice PI, LLC is fighting the
25 piracy, such as the transmission of DMCA notices to Internet Service Providers
26 and, when necessary, commencement of litigation against infringers. Simply put,
to support our distributors and our agreements with them, we must fight piracy and
we must be proactive.

Neither Venice PI, LLC nor Voltage Pictures seek to use the Court system to profit from infringement. Revenues from our licensing and distribution agreements are the dominant driver of Voltage's revenues. As such, our anti-piracy efforts are not a revenue model. The main goal of our anti-piracy effort is to provide education about the harmful effects of piracy in the movie industry and to deter copyright infringers. Indeed, we currently send out hundreds of thousands of DMCA notices to infringers before filing suit and prefer to stop piracy outside of litigation.

...

We want the courts to know that we need the law to be enforced to ensure the survival of our business. It is our hope that by upholding the law, courts will allow all creative people the ability to make a living through the authorized distribution of the works through legitimate channels. To support the creative team, we implemented the policy that any net compensation received from our anti-piracy program flows into the royalty 'waterfall' and gets distributed to those who worked on the motion picture. This often includes technicians, general services, actors, directors and others in the same manner as ticket sales or other systems.

(Dkt. 88, ¶¶ 12-17, emphasis added)

B. THE ENTITY STATUS IS ACCURATELY STATED, AND THE COMPLAINTS STATE A CLAIM

The Court's latest *sue sponte* Minute Order of January 8, 2018 (Dkt. 32) raised questions about Plaintiff's parent entities, concluding that they appear not to exist. As set forth below, Plaintiff's submissions on this point have always been accurate. The Court also questioned whether the complaint states a claim for relief, and this is addressed below as well.

1. Entity Status of Plaintiff and Compliance with LR 7.1(a)

In response to the Court's show cause order on points (a) and (b), (Dkt. 32 ¶ 5), Plaintiff states that it is an active, properly formed California limited liability company. (Wickstrom Dec. ¶ 5 & Ex. A) Plaintiff is owned and managed by Lost Dog Productions, LLC, a Nevada limited liability company. (Id. & Ex. B) Lost Dog Productions, LLC is in turn owned by Voltage Productions, LLC, a Nevada limited liability company. (Id. & Ex. C) Voltage Pictures, LLC, an affiliated entity, is a California limited liability company. (Id. & Ex. D)

Accordingly, Plaintiff is a properly formed limited liability company, owned and managed by a Nevada limited liability company. Because Plaintiff's Local Civil Rule 7.1(a) corporate disclosure document (see, e.g., C17-988 Dkt. 4) correctly disclosed these facts, Plaintiff did not fail to comply with the rule and there are no grounds for any further action by the Court.

2. *Plaintiff States a Cognizable Claim that Should Not be Dismissed*

The Court *sue sponte* asked Plaintiff to demonstrate that it has stated a claim under Rule 12(b)(6). Plaintiff respectfully responds to the Court's show cause order on point (c), (Dkt. 32 ¶ 5), below.

In these cases, Plaintiff has been permitted to obtain account holder information but not allowed to conduct further discovery prior to being required to identify defendants by name. Nonetheless, Defendants are named with greater certainty than merely the fact that they are the account holder, and with facts that more than make the allegation of infringement by the named defendant plausible. Thus, at this stage, Plaintiff established (and has alleged) that copyright infringement of Plaintiff's motion picture occurred at the specific IP address assigned to the named Defendant at a specific date and time (Dkt. 11 at ¶ 10, ¶¶ 18-23). In addition, the infringement was not a single isolated event, but rather an instance of significant BitTorrent activity in which Defendant's IP address participated during the relevant period (Id. at ¶ 12; *see also* Dkt. 29, ¶¶ 38-41 & Ex. D). Given the amount of activity (that is, as noted above, Defendants are repeat offenders), there is a high probability that the account holder is directly involved and aware of the activity. The materials shared and downloaded would not be of interest to a child, thereby suggesting an adult at the residence (Id.), and the physical location and layout of Defendant's residence makes it unlikely that his IP address was hijacked by a neighbor or passerby (Id. at ¶ 14).¹

¹ See also the expert report of Dr. G. Mitchell of Future Focus, Inc. prepared specifically for *Cobbler v. James*, Case No. 15-cv-1430TSZ to address the WiFi questions raised by the Court in that case.

1 The above allegations, tied to the background investigation, satisfy the requirements to
 2 state a claim for relief. A complaint fails to state a claim upon which relief may be granted if the
 3 plaintiff fails to allege the “grounds” of his “entitlement to relief.” *Bell Atlantic Corp. v. Twombly*,
 4 550 U.S. 544, 555 (2007). A plaintiff must plead “factual content that allows the court to draw the
 5 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
 6 556 U.S. 662, 678 (2009). A court should only dismiss a complaint for failure to state a claim if,
 7 taking all factual allegations as true, it does not contain “enough facts to state a claim to relief that
 8 is plausible on its face.” *Id.* at 662; *see also Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1034
 9 (9th Cir. 2010). “A claim has facial plausibility when the plaintiff pleads factual content that allows
 10 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 11 *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010). This standard
 12 is not, however, akin to a “probability requirement.” Rather, it only asks for “more than a sheer
 13 possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. In the present case, the
 14 fact of infringement is not only plausible, it is highly probable.

15 Accordingly, Plaintiff has pled “facts tending to exclude the possibility that [an] alternative
 16 explanation is true,” as has been required by this Court. These factual assertions are more than
 17 “formulaic recitation of the elements” or “bare legal conclusion,” and specifically allege that
 18 Defendant copied Plaintiff’s work. They provide fair notice of the infringed copyright and how
 19 the unauthorized copying occurred. Plaintiff’s infringement claim is “plausible on its face,” and
 20 readily pass the *Twombly/Iqbal* standard for notice pleading. Such pleadings have been found
 21 adequate to defeat similar motions for dismissal in other cases in this jurisdiction. This claim has
 22 survived a number of similar motions to dismiss in this jurisdiction. *See, e.g., Cobbler Nevada v.*
 23 *Hamilton*, 16-cv-1616TSZ Dkt. 84 (July 28, 2016); *QOTD Film v. Does*, 16-cv-371RSL Dkt. 70
 24 (October 11, 2016); *Criminal Prod. v. Winter*, 16-cv-1647RAJ Dkt. 36 (June 29, 2017); *Cook*
 25 *Prod. v. Swanicke*, 16-cv-1884TSZ Dkt. 68) (August 24, 2017); *Criminal Prod. v. Does*,
 26 17-cv-102RAJ (January 8, 2018).

1 Noteworthy is *Criminal Prod.* case 16-cv-1647—which is based on due diligence and
 2 pleadings comparable to those in the present case. In *Criminal Prod.*, the Court specifically
 3 addressed the same *Twombly/Iqbal* standard and distinguished an earlier case in this jurisdiction
 4 in denying a similar motion for dismissal. (*Criminal Prod.*, Dkt. 36, pp. 3-4; *see also* *QOTD Film*,
 5 Dkt. 70, pp. 3-4) Plaintiff respectfully submits that as in *Criminal Prod.* and earlier cases, it has in
 6 this case pled sufficient facts—which much be taken as true—to support its allegations and meet
 7 the threshold requirement to defeat dismissal. Accordingly, Plaintiff respectfully submits that its
 8 amended complaint “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief
 9 that is plausible on its face[.]’” *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

10 It is unclear what further, if anything, beyond the assertions of the pleadings the Court may
 11 be referencing when it requests Plaintiff to further show cause why its claims should not be
 12 dismissed for “failure to state a cognizable claim.” After outlining its copyright infringement
 13 claims, including a detailed description of the technology used for the infringement (*see* Dkt. 11.
 14 ¶¶ 27-39), Plaintiff specifically identified Defendant by name and address as the party which,
 15 “based on the investigation to date, and on information and belief,” was the responsible party.
 16 (*Id.* ¶¶ 17, 18-23) The *Twombly/Iqbal* standard for notice pleading requires nothing more.

17 **C. THE COURT’S OTHER CONCERNS ARE BASED ON INACCURACIES AND** 18 **UNSUPPORTED ASSERTIONS**

19 The Court raised additional concerns that appear to originate from online BitTorrent
 20 advocacy blogs and defense-counsel letters raising a myriad of defenses to Plaintiff’s claims.
 21 However, none of these defenses have merit, and many have already been debunked by numerous
 22 courts around the country, as discussed below.

23 Plaintiff is concerned that, insofar as the basis for the show case order may be found in
 24 websites and letters that are not part of the record in this case, and which are not under oath and
 25 cannot be squarely confronted in this response, that its Due Process rights may be violated. While
 26 Plaintiff believes it can fully satisfy the Court with the present submission, in the event the Court

finds support in any of the materials cited in its Order (such as the letter of Christopher Lynch, or content on a website), Plaintiff requests the opportunity to conduct discovery into such assertions in order to defend itself. Specifically, Plaintiff and its counsel request the opportunity for third-party discovery of the purveyors of the cited online sources, as well as Mr. Lynch, whose unsubstantiated letter containing accusations in the *Collins* case appear to form the basis for much of the Court's criticisms.² If any remedy is to be imposed that in any way relies on these sources, Plaintiff's due process rights surely demand that it be given the opportunity to know and confront its accusers in this regard, and to thereby prove that none of them have any evidence (let alone reliable, credible, and admissible evidence) to support their assertions.

1. No Ethical Issues are Implicated by Plaintiff's Investigations; Plaintiff's Data Providers are Not Subject to the Licensing Requirements of RCW 18.165, and Committed no Crime

As explained in detail below, given that (1) on its face, RCW 18.165.150 does not apply to Plaintiff's investigators because that they are not located in Washington and do not conduct any private investigation in Washington; (2) Plaintiff's investigators easily fall within an exception of the statute; and (3) courts around the country have long rejected this argument—saying it “borders on the frivolous”—Plaintiff's counsel reasonably believed at the time—and continues to believe to date—that no Court would give weight to the frivolous claim that its investigators committed a crime, and that disclosure would not be required because it was not in any way material.

Plaintiff has further confirmed through independent assessment by an ethics professional that its actions do not constitute any impropriety or violate any ethical or other duty to the Court or the bar. (Hricik Dec. ¶¶ 2, 4-19) Professor Hricik unequivocally concluded that there was no ethical violation:

² The Court appears to rely on its own *ex parte* investigations, as well as give credence to unsubstantiated assertions posted on various websites or in defense counsel letters in unrelated cases. Plaintiff submits that such judicial fact-finding runs contrary to the mission of independent judiciary. See Declaration of Professor David Hricik, submitted herewith, n. 1.

Perhaps more importantly, if a reasonable lawyer would believe that the statute did not reach Mr. Arheidt's activities in Germany, then Mr. Lowe did not breach any duty of candor. This is because the comment to Washington Rule 3.3(f) states: 'The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer *and that the lawyer reasonably believes are necessary to an informed decision.*' (Emph. added.). No court should encourage lawyers to load up a record with irrelevant information, because that could bury the important facts and be inefficient.

In my opinion, a reasonable lawyer would not believe that the statute reached Mr. Arheidt's activities in Germany. . . .

(Id. ¶¶ 11-12).

Plaintiff's Investigations Do Not Occur in Washington

There can be no possibility of a violation of the Washington investigator statute because the investigations do not occur in Washington. Neither GuardaLey Ltd. ("GuardaLey"), the data provider; MaverickEye, UG ("MEU"), the licensee of the infringement detection system; nor Daniel Arheidt, the consultant and "investigator" regarding the IP address and related infringement, are subject to the licensing requirements of Revised Code of Washington Chapter 18.165. RCW 18.165.150 prohibits unlicensed investigation by "any person who performs the functions and duties of a private investigator *in this state* without being licensed." (emphasis added) GuardaLey and MEU are German companies, and neither it nor MEU is a company organized, existing, located or operating in Washington State. They have no employees or agents in Washington. They conduct no business in Washington. They pay no taxes in Washington. Their servers do not detect or record evidence of infringement in Washington State. Indeed, their servers and all employees or consultants are located in Germany and thus the analysis is conducted in Germany. Mr. Arheidt lives and works in Germany, and has never performed any of his services in Washington State. (See Dkt. 29 ¶¶ 3, 5; Supp. Perino Dec. ¶¶ 16-17, 24; Arheidt Dec. ¶¶ 6-18, 20)

After exhaustively researching this issue, Plaintiff was unable to locate a single case supporting the proposition that a person located outside the state, who conducts online research

1 and investigation outside the state, is violating RCW 18.165.150. Even if GuardaLay, MEU or
 2 Mr. Arheidt resided in Washington or performed investigation of the IP addresses in
 3 Washington—which they do not—they would likely fall within one or more exemptions provided
 4 by RCW 18.165.020, e.g., (10) “A person who is a forensic scientist, accident reconstructionist,
 5 *or other person who performs similar functions and does not hold himself or herself out to be*
 6 *an investigator in any other capacity.*” (emphasis added).³

7 **Plaintiff’s Investigations Occur in Public Forums with No Expectation of Privacy**

8 Further, RCW 18.165.150 cannot possibly apply to MEU’s detection and collection of
 9 infringement evidence because RCW 18.165.020 provides that the private investigator licensure
 10 requirement does not apply to “[a] person solely engaged in the business of securing information
 11 about persons or property from public records[.]” The Court’s order uses the term “surveillance,”
 12 suggesting that Plaintiff’s investigator has somehow reached into or looks into the computers of
 13 Washington residents, but that is inaccurate. Plaintiff’s investigators do not access any of the
 14 Defendants’ computers in any way, and do not plant software on them, look into them, or “surveil”
 15 them in any manner. Rather, and consistent with the RCW, the information that MEU collected
 16 was readily accessible to the general public because it is sent out into the public by the Defendants
 17 themselves.

18 MEU’s infringement detection system enters public BitTorrent swarms just as any regular
 19 BitTorrent user would. The swarm contains multiple BitTorrent users who are all downloading
 20 and uploading the same work between and among themselves. MEU’s system then receives
 21 information from a computer connected to the Internet from a defendant’s IP address and which
 22 transmits the data directly to MEU’s server. All of these steps are taken in the ordinary and normal
 23 course of using a BitTorrent protocol. The only difference between a BitTorrent user and MEU is
 24

25 ³ The statute defines “forensic scientist” or “accident reconstructionist” to mean “a person engaged
 26 exclusively in collecting and analyzing physical evidence and data relating to an accident *or other matter* and
compiling such evidence or data to render an opinion of likely cause, fault, or circumstance of the accident or
matter.” (emphasis added)

1 that instead of using a regular publicly available BitTorrent client to accomplish these steps, MEU
 2 uses a specialized client which was developed so that MEU cannot redistribute content it receives
 3 back into the BitTorrent swarm. MEU simply made a record of each transaction in which each
 4 defendant's computers voluntarily sent pieces of data (here, pieces of Plaintiff's motion picture)
 5 to MEU. Thus, in summary, defendants voluntarily send their IP address identifying information
 6 out into the public through the swarm, and Plaintiff does not reach into the defendant's computer
 7 to retrieve it. The IP address information is transmitted as part of the metadata relayed between
 8 computers during a TCP/IP connection. Similarly, Plaintiff's "Additional Evidence," which shows
 9 a detailed download history of other third-party works emanating from a Defendant's IP address,
 10 is information that is also publicly available. As such, Plaintiff falls within the exception listed.
 11 (See Supp. Perino Dec. ¶¶ 24-25; Declaration of Stephen M. Bunting, ¶ 44) Accordingly, no
 12 violation of Washington laws occurred.

13 **Relevant Legal Authority Confirms No Violation of Private Investigator Statutes**

14 Plaintiff and its counsel are not aware of any authority in support of the applicability of the
 15 Washington statute in this case. However, BitTorrent defense groups, in their advocacy blogs, have
 16 long asserted that similar statutes in other states have been violated by investigators, even though
 17 these very arguments have been rejected by a number of courts around the country (and, indeed,
 18 every court Plaintiff is aware of that has considered the question). Among the earliest cases was
 19 *Capital Records, Inc. v. Thomas-Rasset*, 2009 U.S. Dist. LEXIS 50075 (D. Minn. June 11, 2009).
 20 The case involved MediaSentry, which utilized software to investigate and identify BitTorrent
 21 (peer-to-peer) infringement involving copyrighted musical recordings. Defendants argued that
 22 MediaSentry violated the Minnesota Private Detective Act, which precluded investigation in the
 23 state without a license, and defined investigation to include "obtaining through investigation
 24 evidence to be used before any authorized investigating committee, board of award, board of
 25 arbitration, administrative body, or officer or in preparation for trial of civil or criminal cases." *Id.*
 26 at *4. Defendant asserted that MediaSentry improperly "investigated the identity of the user of the

1 computer from which it downloaded the songs at issue in this lawsuit and when it obtained
 2 evidence of the copyrighted songs on Defendant's computer." Id. at *5. The court concluded that
 3 MediaSentry was not subject to the Minnesota Private Detective Act, for several reasons,
 4 including:

5 MediaSentry does not operate within Minnesota. It has no employees in Minnesota
 6 and does not conduct any activities in Minnesota. It pays no taxes in the state and
 7 has no agent for service of process here. MediaSentry conducted no activity in
 8 Minnesota relating to this case, and all of the information it received was sent by
 9 Defendant from her computer to MediaSentry's computer in a state other than
 Minnesota. Merely monitoring incoming internet traffic sent from a computer in
 another state is insufficient to constitute engaging in the business of private
 detective within the state of Minnesota.

10 (Id. at *6, internal citations omitted) Other courts have agreed, finding that the fact that
 11 (1) investigators were located outside the state, and (2) investigations occurred outside the state,
 12 meaning that the statutes did not apply.

13 In *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 257 n. 21 (D. Maine Oct 29,
 14 2008), for example, the Court declines to prohibit testimony from a foreign investigator in a
 15 copyright infringement case again involving peer-to-peer infringement. Noteworthy, the court
 16 declined to decide whether the statute applied to Internet searches of the type undertaken, the court
 17 explained how online investigation was different in character from a typical in-state investigator,
 18 whose investigators occur online from locations geographically remove from the state, and how it
 19 "cannot be correct" that it requires a private investigation (what would be subject to such license
 20 requirement) to "determine that the University of Maine is the Doe Defendants' ISP, that some
 21 persons using that ISP are perhaps using online media distribution systems, such as Gnutella, and
 22 that a peer-to-peer file sharing network allows users to reproduce and distribute copyrighted works
 23 anonymously." Id. at 257; accord *Malibu Media, LLC v. Doe*, 2014 U.S. Dist. LEXIS 38718, *8-9
 24 (N.D. Ill. Mar 24, 2014) (refusing to quash a discovery subpoena based on defendants' claim that
 25 the BitTorrent investigator was unlicensed).
 26

1 Most recently, when the same “foreign investigator” defense was recycled again in a
 2 California BitTorrent case directly analogous to the cases at bar, the court pulled no punches in
 3 characterizing this argument as “border[ing] on the frivolous:”

4 Defendant further suggests that Mr. Fieser is not licensed as a private investigator
 5 in California, and that the court therefore should not accept his testimony. **That**
 6 **argument borders on the frivolous.** Individuals provide evidence in court every
 7 day without necessarily being licensed as private investigators. Significantly,
 8 defendant cites no legal authority for the proposition that Mr. Fieser, a German
 9 resident, required a California private investigator license to perform the type of
 10 work he did for plaintiff, or to provide evidence regarding such work in court.

11 *Malibu Media, LLC v. Doe*, 2017 U.S. Dist. LEXIS 30632 (E.D.Ca. Mar 3, 2017) (emphasis
 12 added). In short, Plaintiff has not located a single case in which out-of-state investigators engaging
 13 in BitTorrent analysis have been found to violate any criminal statute of the type at issue here.

14 Plaintiff appreciates the proposition that the use of an investigator who committed a crime
 15 in the course of the investigation should be disclosed in an *ex parte* proceeding. But as explained
 16 in detail above, if no reasonable attorney would expect that the assertion is material, and where the
 17 assertion is so baseless that it has been characterized as frivolous by other courts, Plaintiff did not
 18 need to advise the Court here of such unfounded and frivolous accusations. Accordingly, the
 19 investigators did not violate any Washington laws, and Plaintiff and its counsel did not violate any
 20 Rules of Professional Conduct.

21 **2. Plaintiff’s Investigators are Not “aliases or even fictitious”**

22 The Court expressed concern that the German investigators that have been used by various
 23 plaintiffs in different BitTorrent cases in different jurisdictions over the last decade “might be
 24 aliases or even fictitious.” The Plaintiff and undersigned counsel appreciate the desire of the Court
 25 to ensure that this proposition is not true, but at the same time it is disheartening that the Court
 26 could believe that they would even remotely consider such practices. Not only are each of the
 individuals listed above real people, many have actually testified in depositions and federal court
 evidentiary hearings in the United States or other jurisdictions. This assertion, as with others

1 addressed above, underscores the problems inherent in relying on evidence not submitted to the
 2 court under oath, and which has not been challenged through depositions or other discovery
 3 techniques.

4 The source relied upon by the Court refers to certain persons by name, speculating that
 5 they are aliases or do not exist. While none of the referenced individuals other than Daniel Arheidt
 6 are relevant to the cases captioned here, and apart from Mr. Arheidt and Daniel Macek, none have
 7 been used by Plaintiff or its counsel, to assure the Court there is no merit to the numerous
 8 conspiracy theories, undersigned counsel has undertaken to locate and provide proof that Daniel
 9 Arheidt, Darren Griffin, Daniel Macek, Daniel Susac, Tobias Fieser and Michael Patzer are not
 10 aliases or fictitious individuals. The submitted Arheidt Declaration speaks directly to his name,
 11 background and existence, as well as his relationship to the other individuals, where applicable.⁴
 12 With respect to the remaining individuals, the submitted Lowe Declaration compiles and explains
 13 the documents and other information confirming to the extent reasonable and possible under the
 14 circumstances their name, existence and relationship to each other, which includes confirmation
 15 of governmental identification, transcript excerpts from testimony provided in other cases, and a
 16 detailed explanation of each individual's relationship (or former relationship) with GuardaLey,
 17 MEU or any other companies which Plaintiff knows of or which they have worked with in the
 18 past. (Lowe Dec. ¶¶ 2-18; see also Supp. Perino Dec. ¶¶ 12-22)

19 **3. Technology Used in BitTorrent Copyright cases is Reliable and verified by**
 20 **Experts and Other Courts**

21 Since the details of the MEU infringement detection system are technical, Plaintiff refers to the
 22 expert report of Benjamin Perino, Chief Executive Officer and Senior Developer at GuardaLey, which
 23 licenses the backend software and servers to MEU. (Dkt. 29) Mr. Perino's report (1) provides his
 24 credentials (¶¶ 1-13), (2) describes the technology in great detail (¶¶ 14-25), and (3) explains that the
 25

26 ⁴ This is specifically in response to the Court's request at Dkt. 32, n. 2.

1 TCP/IP connections cannot be “spoofed” or yield false positive results (§§ 26-37) generally and as
2 applied in these cases. (Id.)

3 The Court criticized Mr. Perino’s qualifications as consisting of a “technical high school
4 education and work experience unrelated to the peer-to-peer file-sharing technology known as
5 BitTorrent[.]” Pursuant to Fed. R. Evid. 702, a witness is qualified as an expert by “knowledge, skill,
6 experience, training, or education.” Mr. Perino’s report establishes that he possessed years of specialized
7 experience in the Information Technology industry and, specifically, has spent the last 10 years
8 developing anti-piracy technology for use in the BitTorrent network. To the extent this was not made
9 clear in Mr. Perino’s report, Plaintiff submits a supplemental declaration of Mr. Perino that further
10 confirms that his extensive work experience may qualifies him as an expert in BitTorrent and peer-to-
11 peer technology. Additionally, as stated in his report, Mr. Perino has been subpoenaed to testify either at
12 deposition or trial on this specific BitTorrent technology. Of those listed, he has in fact testified as an
13 expert in these cases. (Supp. Perino Dec. §§ 4-11)

14 Respectfully, the Court appears to have inadvertently overlooked the declarations of two
15 independent experts, Dr. Simone Richter and Mr. Robert D. Young, who evaluated the infringement
16 detection system. (Dkt. 29-1, Exs. E & F) These experts further confirm the accuracy of the system.
17 Understanding that this Court and numerous defense counsel struggled with an understanding of MEU’s
18 and similar technology and its international experts and witnesses, Plaintiff has secured another technical
19 expert, Stephen M. Bunting of Lewes, Delaware, to thoroughly evaluate the system. Mr. Bunting has
20 recently provided an expert report describing his test of the GuardaLey/MEU infringement detection
21 system. Mr. Bunting’s report confirms that the system accurately detects and records IP addresses
22 transacting within the BitTorrent network. His report also confirms that Mr. Perino’s expert report
23 accurately describes what the infringement detection system does, and its effectiveness and accuracy.
24 Mr. Bunting’s report provides a fourth expert witness—along with that of Mr. Perino, Dr. Richter and
25 Mr. Young. (Bunting Dec. §§ 1-46)

1 **4. MEU’S Technology Does Not Yield False Positives nor Does It Employ**
2 **Hacking or Spoofing of the IP Addresses**

3 The Court challenges Mr. Perino’s initial assessment that the infringement detection system
4 “cannot yield a false positive” because Mr. Perino “does not have the qualifications necessary to be
5 considered an expert in the field in question” and “his opinion . . . is both contrary to common sense and
6 inconsistent with plaintiff’s counsel’s conduct in other matters in this district.” Plaintiff respectfully
7 submits that these propositions are in error.

8 As explained above, Mr. Perino is fully qualified as an expert pursuant to Fed. R. Evid. 702 as a
9 person with “knowledge, skill, experience, training, or education”—regardless of his level of formal
10 education. (Dkt. 29, ¶¶ 3-11; see also Supp. Perino Dec. ¶¶ 4-11) While critical of his “education,” the
11 Court provides no support for its conclusion that Mr. Perino’s “knowledge, skill, experience, training”
12 fail to qualify him as an expert for this purpose. Moreover, as noted, Mr. Perino’s opinions on the
13 technology he developed have been further confirmed by no fewer than three independent experts.

14 The Court concludes, without more, that Mr. Perino’s opinion regarding false positives is
15 “contrary to common sense.” It is unclear what the Court is relying on in reaching this conclusion, and
16 Plaintiff submits this is not a matter of judicial notice. Though there may be ways for individuals to hide
17 or mask their IP addresses in some settings, and perhaps the Court is aware of such concepts, they have
18 no applicability here. As explained in detail in Mr. Perino’s report, the reason there are no false positive
19 errors is because the infringement detection system makes a direct TCP/IP connection or “handshake”
20 with the IP address and port where the infringement occurred to confirm the transaction. See also the
21 expert report of Dr. Richter, which also addresses this issue and supports Mr. Perino’s conclusion.
22 (Dkt. 29-1 at 11.4-11.14, 11.19-11.22, 11.26-11.30) This has been yet further confirmed in the Bunting
23 report. (Bunting Dec. ¶¶ 38-43)

24 This “false positive” issue is yet another old argument recycled by BitTorrent infringement
25 blogs and advocates despite being disproven, and has been addressed by expert testimony in
26 analogous cases. For example, an industry expert Michael Patzer provided extensive testimony

1 before the Honorable Judge Steven I. Locke in the Eastern District of New York on April 20, 2016
 2 in *Malibu Media, LLC v. John Doe Subscriber Assigned IP Address 98.116.160.61*, Case No. 15-
 3 cv-3504, Dkt. 34-1 (E.D. NY June 3, 2016). Mr. Patzer’s testimony pertained to the analogous
 4 investigative software used by Excipio addressing the “false positive” issue raised by this Court.
 5 Mr. Patzer specifically distinguished the modern investigative technology used by Excipio (and
 6 MEU) that uses *direct* monitoring from the *indirect* detection technology historically used and
 7 often referenced by defense counsel. (See Lowe Ex. B, pp. 30-48, in particular pp. 39-45)

8 Finally, the fact that plaintiffs have elected to dismiss its claims in other cases is not an indication
 9 that “false positive” errors have occurred. In this jurisdiction alone, plaintiff have voluntarily dismissed
 10 many claims for various reasons. Often plaintiffs make a strategic determination—as is often done in
 11 virtually any type of litigation—that the particular case is not worth pursuing at that time. For example,
 12 a plaintiff may dismiss a case if the ISP subpoena response establishes that the Defendant is actively
 13 serving in the military, or if the Defendant is experiencing financial or physical hardship, or if Defendant
 14 is a company and locating the infringer would be too costly or burdensome on Plaintiff.

15 The Court points to a series of letters from Mr. Lynch on behalf of clients whose claims were
 16 dismissed after his submission of the letter as proof of a “false positive” result with MEU’s infringement
 17 detection system. But dismissals in these and other such cases had nothing to do with the veracity of the
 18 technology. Plaintiff reviewed each case listed in the Court’s Order, and was able to determine that none
 19 of the respective defendants had been dismissed because of a “false positive” result or other data problem.
 20 The data in each case listed confirms that the infringement occurred at the household via the noted IP
 21 address at the date and time indicated. To the best of their recollection, Plaintiff’s counsel has never
 22 dismissed a case because of a “false positive.” This is because no Defendant has ever presented evidence
 23 of a “false positive” error. As explained by one court, it would be a “disingenuous” argument to jump to
 24 the conclusion that dismissing a case necessarily suggests that a plaintiff identified the wrong defendant.
 25 *Malibu Media, LLC v. Doe*, 2017 U.S. Dist. LEXIS 30632, *9 n.4 (E.D. Cal. March 3, 2017).
 26

Plaintiff respectfully submits that it has more than met the requirements under law and applicable rules to proceed with its cases. Plaintiff's copyrights have not been credibly challenged, it more than states a plausible claim against defendants, and is entitled to enforce its federal copyrights. Indeed, the courts exists precisely for this purpose.

RESPECTFULLY SUBMITTED February 5, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served to all counsel or parties of record who are deemed to have consented to electronic service via the Court's CM/ECF system, and to all Defendants at their last known address via U.S. mail.

s/ David A. Lowe